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Case Notes

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CASE NOTES

ASSUMABLE MORTGAGES—FEDERAL HOME LOAN BANK BOARD'S REGULATION ALLOWING FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATIONS TO EXERCISE DUE-ON-SALE CLAUSES OF MORTGAGES PREEMPTS CONTRARY STATE DOCTRINE—*Fidelity Federal Savings and Loan Association v. De La Cuesta*, 102 S. Ct. 3014 (1982).

Reginald De La Cuesta, Alphonso Moore, and John Whitcombe each purchased real property from a party who had borrowed money from appellant Fidelity Savings and Loan Association (Fidelity). The transactions occurred in California and involved property located in the state. The borrowers had previously given Fidelity deeds of trust on the property. Each deed contained a due-on-sale clause, which allows a lender to declare the entire balance of the loan due and payable if the property securing the loan is sold or transferred without the lender's prior written consent.[1] Fidelity had no

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1. A typical due-on-sale clause uses the language of ¶ 17 of the uniform mortgage instrument drafted by the Federal Home Loan Mortgage Corporation (FHLMC) and the Federal National Mortgage Association (FNMA). Paragraph 17 of the Note provides:

> Transfer of the Property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this ¶ 17 and if Borrower's successor in interest has executed a written

prior notice of the sales and therefore proceeded to enforce the due-on-sale clauses to accelerate payment of the loans. When the loans remained unpaid, Fidelity instituted nonjudicial foreclosure proceedings.[2]

Each purchaser then filed suit against Fidelity in the California superior court, asserting that enforcement of the due-on-sale clauses violated the doctrine of *Wellenkamp v. Bank of America*.[3] The superior court consolidated the actions and granted Fidelity's motion for summary judgment on the ground that the federal government alone regulated federal savings and loan associations.

The California court of appeal reversed, holding that *Wellenkamp* was controlling and that federal law had not preempted state due-on-sale law.[4] Because Fidelity had made no claim of an impairment to its security or risk of default as a result of the outright sale of the property to De La Cuesta, Moore, and Whitcombe,[5] exercise of the due-on-sale clause would constitute an unreasonable restraint on alienation.

The California Supreme Court denied Fidelity's petition for hearing,[6] but the United States Supreme Court noted probable jurisdiction due to the federal preemption question involved.[7] The Supreme Court held, in *Fidelity Federal Sav-*

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assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Deed of Trust and the Note.

If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration in accordance with ¶ 14 hereof. Such notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by ¶ 18 hereof.

FNMA/FHLMC, UNIFORM INSTRUMENT, California ed., One to Four Family Dwellings (August 1979) (available in any federally chartered savings and loan, and on request from FNMA, 10920 Wilshire Blvd., Los Angeles, CA 90024).

2. In a nonjudicial foreclosure proceeding, the mortgagee (lender) may sell the mortgaged property to obtain satisfaction of the mortgage from the proceeds. This power of sale is contained in the mortgage itself. The mortgaged property is the security for the mortgage debt and the lender need not obtain a court order to direct the sale. *See* R. BOYER, SURVEY OF THE LAW OF PROPERTY, 499-501 (3d ed. 1981).

3. 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

4. De La Cuesta v. Fidelity Fed. Sav. and Loan Ass'n, 121 Cal. App. 3d 328, 335-36, 175 Cal. Rptr. 467, 471-72 (1981).

5. *Id.* at 333, 175 Cal. Rptr. at 469.

6. *Id.* at 348, 175 Cal. Rptr. at 479.

7. 102 S. Ct. 3014 (1982).

ings and Loan Association v. De La Cuesta,[8] that the Federal Home Loan Bank Board's[9] due-on-sale regulation preempts any conflicting state restrictions on the due-on-sale practices of federal savings and loan associations and barred the application of *Wellenkamp* to federal savings and loans.

The United States Supreme Court interpreted section 5(a) of the Home Owners' Loan Act of 1933[10] as conferring on the Board plenary authority to regulate federal savings and loans. The Court reasoned that 12 C.F.R. section 545.8-3(g),[11] which applies to loans made after July 31, 1976, does not confine a federal association's right to accelerate a loan to cases where the lender's security is impaired.[12] In addition, the Court found that the language of 12 C.F.R. section 545.8-3(f)[13]

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8. *Id.*

9. Hereinafter cited as the "Board."

10. 12 U.S.C. § 1464(a) (1976) provides:

> In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations," as "Federal mutual savings banks" . . . , and to issue charters therefor . . . .

The Home Owners' Loan Act [hereinafter cited as HOLA] was designed to give emergency aid for home mortgage indebtedness in the 1930's when half of all home loans in America were in default. Thus, HOLA created a system of federal savings and loans, regulated by the Board, to finance the purchase of homes. 102 S. Ct. at 3025-26.

11. 12 C.F.R. § 545.8-3(g) provides:

> [A] Federal association: . . . waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) agree in writing that the person's credit is satisfactory to the association and that interest on sums secured by the association's security interest will be payable at a rate the association shall request. Upon such agreement and resultant waiver the association shall release the existing borrower from all obligations under the loan instruments, and the association is deemed to have made a new loan to the existing borrower's successor in interest.

12. 102 S. Ct. at 3023-24.

13. 12 C.F.R. § 545.8-3(f) (1982) provides:

> [A federal savings and loan] continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as [otherwise] provided in . . . this section . . . , exercise by the association of such option (hereafter called a due-on-sale clause)

indicates the board's intent to preempt state law.[14]

Where Congress has empowered an administrative agency such as the Board to promulgate regulations, any regulations intended to preempt state law will do so.[15] Consequently, state courts may not review the regulations promulgated by that agency unless the agency attempts to regulate an area not within its authority.[16] Only the Supreme Court may review the appropriateness of regulations promulgated by a federal agency.[17]

In reviewing the appropriateness of the regulations, the Court reasoned that because Congress delegated power to the Board for the purpose of creating and regulating federal savings and loan associations, the Board acted within its statutory authority in issuing the preemptive due-on-sale regulation.[18] The language of HOLA suggests that the Board was authorized to promulgate regulations to ensure that federal savings and loan associations would remain financially stable and able to finance home construction and purchase. The Court concluded that the Board had reasonably exercised its authority in promulgating the due-on-sale regulation in order to stabilize the lending practices of federal savings and loan associations.[19]

There was a conflicting provision, however, in two of the three deeds involved in this case. This provision, paragraph

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shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.

14. 102 S. Ct. at 3023.

15. *Id.* at 3022. An exception to this general rule occurs when the administrator exceeds the statutory authority or acts arbitrarily. *See* United States v. Shimer, 367 U.S. 374, 381-82 (1961) (the Court interpreted the regulatory powers granted to the Veterans' Administration by the Servicemen's Readjustment Act to be broad enough to authorize the Veterans' Administration to adopt regulations preempting Pennsylvania law regarding deficiency judgments).

16. 102 S. Ct. at 3022 (citing United States v. Shimer, 367 U.S. 374, 383 (1961)).

17. 102 S. Ct. at 3022-23.

18. *Id. See supra* note 10.

19. 102 S. Ct. at 3025-31. The majority viewed the enforcement of due-on-sale clauses as an economic necessity. Thus, the majority reasoned that due-on-sale clauses help stabilize interest rates generally in the home loan market. The enforcement of due-on-sale clauses allows savings and loans to keep the cost of long-term real estate loans down. Due-on-sale clauses aid savings and loans in replacing long-term low-yield loans with new loans at current interest rates. Although the majority acknowledged that a number of state courts have disagreed with the Board's approach, it still found that the Board was within its authority to promulgate a controversial due-on-sale regulation.

fifteen of the Uniform Mortgage Instrument, stated that the deed of trust shall be governed by the law of the jurisdiction in which the property is located.[20] The majority in *De La Cuesta* found, despite paragraph fifteen, that the congressional intent expressed in 12 C.F.R. section 545.8-3(f), to allow federal savings and loans to enforce due-on-sale clauses, supersedes conflicting state law.[21]

The Court cited the preemption doctrine based on the supremacy clause of the United States Constitution[22] and concluded that preemption need not be expressly stated in a statute to be compelled.[23] Although Congress may not have explicitly preempted state regulation in a specific area, state law is still negated where it actually conflicts with federal law.[24] Therefore, state laws are not controlling when it is impossible to comply with both federal and state laws, or when state law obstructs the realization of congressional objectives.[25] Federal law must prevail even if real property law is a matter of special concern to the states.[26] Similarly, federal regulations pre-

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20. Paragraph 15 was developed by the FHLMC and FNMA. Paragraph 15 of the Deed of Trust states:

> Uniform Deed of Trust; Governing Law; Severability. This form of deed of trust combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property. This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Deed of Trust or the Note conflicts with applicable law, such conflicts shall not affect other provisions of this Deed of Trust or the Note which can be given effect without the conflicting provision, and to this end the provisions of the Deed of Trust and the Note are declared to be severable.

FNMA/FHLMC UNIFORM INSTRUMENT, California ed., One to Four Family Dwellings (June 1975).

21. 102 S. Ct. at 3022-25.

22. U.S. CONST. art. VI, cl. 2.

23. 102 S. Ct. at 3022. The majority found that:

> Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1974)).

24. 102 S. Ct. at 3022.

25. *Id.*

26. *Id.* at 3022 (citing Free v. Bland, 369 U.S. 663, 666 (1962)).

vail over state law[27] unless "unreasonable, unauthorized, or inconsistent with" the underlying statute.[28]

The Supreme Court adequately justified its result by relying on the supremacy clause of the Constitution. Since the Federal Home Loan Bank Board has the authority to regulate the functions of federal savings and loans because of a congressional act, clearly any conflicting state laws must be preempted. The Court sidesteps the problems of unreasonable restraint on alienation, however, and in California this had been a crucial consideration.

A lender's right under California law to enforce a due-on-sale clause in response to a transfer of the mortgaged property was not limited until the *Wellenkamp* decision in 1978.[29] Before *Wellenkamp,* the California Supreme Court cases that prohibited the enforcement of due-on-sale clauses when the borrower further encumbered the property securing the loan,[30] and when the borrower entered into an installment land contract covering all or part of the security property,[31] permitted the unrestricted enforcement of due-on-sale clauses where an outright transfer of the property occurred.[32]

In *Wellenkamp,* the purchaser of property sought to enjoin the Bank of America from enforcing its due-on-sale clause in the deed of trust between the Bank and the sellers of the property. Wellenkamp preferred to assume the balance of the loan due from the sellers to the bank in order to take advantage of the lower interest rate. The bank agreed to waive enforcement of the clause in consideration for Wellenkamp's agreement to pay a slightly higher interest rate on the remaining balance of the loan.

Wellenkamp sought an injunction against exercise of the clause and a declaration by the court that exercise of the clause without a showing of impairment to the lender's security would be an unreasonable restraint on alienation. The su-

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27. *Id.* at 3022 (citing United States v. Shimer, 367 U.S. 374 (1961)).

28. *Id.* at 3022 (quoting Ridgway v. Ridgway, 454 U.S. 46, 57 (1981)).

29. Before a loan could be accelerated, the ruling in *Wellenkamp* required a lender to show that impairment to the security or a risk of default will result from an outright sale of the property.

30. 102 S. Ct. at 3031 n.24 (citing La Sala v. Am. Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971)).

31. *Id.* (citing Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974)).

32. 102 S. Ct. at 3031 n.24.

perior court sustained the general demurrer and dismissed the complaint. Wellenkamp appealed to the Supreme Court of California, which reversed, holding that enforcement of a due-on-sale clause upon occurrence of an outright sale constitutes an unreasonable restraint on alienation "unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default."[33]

The *Wellenkamp* decision was based on California Civil Code section 711, which the California Supreme Court found invalidated unreasonable restraints on the alienation of real property.[34] Other states had also found that there was no congressional intent to supplant the laws of all fifty states pertaining to real property and mortgages, areas of fundamental state concern traditionally governed exclusively by state law.[35] Thus, prior to *De La Cuesta*, California law did not invalidate all exercise of due-on-sale clauses although unreasonable restraints on alienation were held invalid.[36]

While involved in litigation with officials of the State of California regarding the exercise by federal savings and loans of due-on-sale clauses, on June 8, 1976, the Board promulgated its regulation 12 C.F.R. section 545.6-11(f) that was amended and recodified as section 545.8-3(f)(1980).[37] Although the regulation states that exercise by the association of the due-on-sale clause shall be exclusively governed by the terms of the loan contract and all rights and remedies of the association and borrower shall be fixed and governed by that contract, this is not the case. In a preamble accompanying the regulation the Board stated: "Finally, it was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed exclusively by Federal law."[38] The

33. 21 Cal. 3d at 953, 582 P.2d at 977, 148 Cal. Rptr. at 386.

34. *Id.* at 948, 582 P.2d at 973, 148 Cal. Rptr. at 382.

35. *See, e.g.*, State Land Bd. v. Corvallis Sand and Gravel Co., 429 U.S. 363, 378-79 (1977); United States v. Little Lake Misere L. Co., 412 U.S. 580, 591-92 (1973); Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n., 308 N.W. 2d 471 (Minn. 1981).

36. Wellenkamp v. Bank of America, 21 Cal. 3d at 948, 582 P.2d at 973, 148 Cal. Rptr. at 382; La Sala v. Am. Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

37. 121 Cal. App. 3d at 339, 175 Cal. Rptr. at 473.

38. *Id.* (citing Preamble to 12 C.F.R. § 545.6-11, 41 Fed. Reg. 18287 (May 3, 1976)).

Board clearly intended that federal associations shall not be bound by or subject to any conflicting state law that imposes different due-on-sale requirements, nor shall federal associations attempt to avoid the limitations on the exercise of due-on-sale clauses established by the Board on the ground that such avoidance of limitations is permissible under state law.

Because the Court found that the *Wellenkamp* doctrine was preempted by a prior federal regulation, it is inapplicable to federal savings and loans.[39] Therefore, the Court concluded that the appellees would not be deprived of any vested rights if Fidelity enforced the due-on-sale clauses in the two deeds agreed to before 1976.[40] Furthermore, the Court found that the savings and loan had the right to accelerate the loans when the deeds were executed, and that right was not diminished by state law.[41] Only a specific agreement in the loan instrument can prevent a federal savings and loan from accelerating a loan upon transfer of the security property.[42]

The Court found support for preempting *Wellenkamp* since most federal district courts have agreed that the Board's regulations preempt state regulation of federal savings and loans.[43] In addition, the majority determined that "Congress

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39. 102 S. Ct. at 3031 n.24.

40. Even before adopting the due-on-sale regulation, the Board had interpreted 12 C.F.R. § 545.8-3(a)—a regulation promulgated in 1948 that requires all loan instruments to "provide for full protection to the Federal association"—as authorizing federal savings and loans to exercise due-on-sale provisions, despite any state law to the contrary, because such clauses help ensure "full protection" to the lender.

102 S. Ct. at 3019 n.4.

41. "When the two deeds of trust were executed in 1971 and 1972, California law permitted the unrestricted exercise of due-on-sale clauses upon outright transfer of the security property, as occurred here." 102 S. Ct. at 3031 n.24.

42. 102 S. Ct. at 3024.

> Moreover, in our view, the second sentence of § 545.8-3(f) simply makes clear that the regulation does not empower federal savings and loans to accelerate a loan upon transfer of the security property unless the parties to the particular loan instrument, as a matter of contract, have given the lender that right. Similarly, if the parties to a given contract agree somehow to limit the association's right to exercise a due-on-sale provision, the second sentence of § 545.8-3(f) precludes the lender from relying on the first sentence as authorizing more expansive use of the clause.

Id.

43. 102 S. Ct. at 3021-22 n.9. *See, e.g.*, Price v. Fla. Fed. Sav. & Loan Ass'n, 524 F. Supp. 175, 178 (M.D. Fla. 1981); First Fed. Sav. & Loan Ass'n v. Peterson, 516 F. Supp. 732, 740 (N.D. Fla. 1981); Dantus v. First Fed. Sav. & Loan Ass'n, 502 F. Supp. 658, 661 (Colo. 1980). *But see* Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan

expressly contemplated, and approved, the Board's promulgation of regulations superseding state law," by examining in detail section 5(a) of HOLA.[44] The legislative history and the language of HOLA convinced the Court of the plenary authority of the Board and of Congress' intent to grant that authority.[45] Similarly, the post-enactment history of HOLA supports the Board's authority regarding the lending practices of federal savings and loans.[46] The Court cited congressional debate in 1978 when Congress amended section 5(a) of HOLA, in which one Representative in the House remarked:

> In no way, of course, would the use of State law requirements for Federal mutual savings banks be interpreted to erode the Bank Board's long-standing plenary authority over Federal savings and loan associations; Federal law alone would continue to govern these institutions in such areas as branching, anti-discrimination, and lending authority.[47]

As a result, the majority found that postenactment events confirm congressional intent to delegate broad discretion to the Board in regulating the lending practices of savings and loans.[48]

The Board may not, however, displace local laws not directly related to savings and loan practices.[49] In a concurring opinion, Justice O'Connor stressed the view that the authority

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Ass'n, 308 N.W.2d 471 (Minn. 1981) (federal regulation does not preempt state regulation of due-on-sale clauses).

44. 102 S. Ct. at 3026.

45. In response to concern expressed during the Senate hearings that HOLA did not prohibit borrowers from obtaining financing and later renting the property, William F. Stevenson (Chairman of the Federal Home Loan Bank Board) observed: "That would be a matter of regulation. That could be covered by regulation under the bill." 102 S. Ct. at 3028 (quoting Senate Committee on Banking and Currency, hearings held Apr. 20 and 22, 1933 at 14).

46. In the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641, Congress amended § 5(a) of HOLA to allow state mutual savings banks to obtain federal charters. This illustrates the continuing intent of Congress to support the power of the Board to regulate federally chartered lending institutions. During debate in the House, Representative St. Germain commented that "congress in no way intends to interfere with the longstanding, all-inclusive power of the Bank Board over the activities of Federal savings and loan associations, including branching authority." 124 CONG. REC. 33847, 33849 (1978). 102 S. Ct. at 3029 n.19.

47. 102 S. Ct. at 3029 n.19 (quoting 124 CONG. REC. 33847, 33848 (1978)).

48. *Id.* at 3029 n.19.

49. *Id.* at 3025 n.14.

of the Board to preempt state laws is not limitless.[50]

> [I]t is clear that HOLA does not permit the Board to preempt the application of all state and local laws to such institutions. Nothing in the language of § 5(a) of HOLA . . . remotely suggests that Congress intended to permit the Board to displace local laws, such as tax statutes and zoning ordinances, not directly related to savings and loan practices.[51]

In contrast, Justice Rehnquist, joined by Justice Stevens in the dissenting opinion,[52] did not view the enforcement of due-on-sale clauses as part of the function of a savings and loan association. Therefore due-on-sale clauses should not be subject to the Board's regulations.[53] The dissent argued that due-on-sale clauses should be treated as a matter of contract law that is controlled by state law since "Congress did not intend to create a federal common law of mortgages."[54]

In 1951, a federal district court dealt with the question of whether a federally chartered savings and loan was required to obtain a state certificate to transact business in the state.[55] The court held in favor of federal preemption, reasoning that the Board had adopted comprehensive rules and regulations concerning the powers and operations of every Federal savings and loan.[56] The Fourth District Court of Appeal, however, was not persuaded that existing state law pertaining to the exercise of due-on-sale clauses in any way infringed upon or was otherwise incompatible with the Board's regulation or control of federal savings and loans.[57] The Fourth District Court found that the *Wellenkamp* rule was a substantive rule of California property and mortgage law, not a regulation of savings and loans.[58] The court further found that the federal regulation merely authorized and did not compel savings and loans to include a due-on-sale clause in their loan contracts

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50. *Id.* at 3031-32 (O'Connor, J., concurring).
51. *Id.* at 3032.
52. *Id.* at 3032-33 (Rehnquist, J., dissenting).
53. *Id.* at 3033.
54. *Id.*
55. De La Cuesta v. Fidelity Fed. Sav. & Loan Ass'n, 121 Cal. App. 3d at 340, 175 Cal. Rptr. at 474 (citing People v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1951)).
56. People v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311 (S.D. Cal. 1951).
57. 121 Cal. App. 3d at 341, 175 Cal. Rptr. at 474.
58. *Id.*

and to enforce them.[59] Thus, the court of appeal reflected the California view before *De La Cuesta*, that because it is not physically impossible to comply with both federal and state law, enforcement of the due-on-sale clause should depend on state contract and property principles[60] and that state regulations should not be preempted automatically.

After *De La Cuesta*, courts throughout the United States must adopt a new approach to the enforcement of due-on-sale clauses. If the lender is a federally chartered savings and loan, the terms of the mortgage contract must be examined to determine whether the lender ever intended to waive its right to accelerate the loan. If not, then the due-on-sale clause is enforceable under current Board regulations.[61]

A probable source of future litigation lies in the ambiguity surrounding the limits of the Board's authority to preempt state laws. The majority opinion could be interpreted so as to gradually expand the Board's control of due-on-sale law and the entire field of federal savings and loan regulation. Another problem area may result from a flood of state chartered institutions changing to federally chartered savings and loans.[62]

The impact of *De La Cuesta* in California does have some limits. For example, state banks, life insurance companies, and private individual lenders are still subject to *Wellenkamp*.[63] While some open questions remain, it is clear that *De La Cuesta* applies to loans made after July 31, 1976, by federal associations that were federally chartered at the time the loan was made. One possible exception may exist where a lender is subject to a defense that the right to enforce the

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59. *Id.* at 341, 175 Cal. Rptr. at 475.

60. *Id.*

61. The California Supreme Court ruling in Dawn Investment Co. v. Superior Court, 30 Cal. 3d 695, 639 P.2d 974, 180 Cal. Rptr. 332 (1982) extended the *Wellenkamp* doctrine to non-institutional lenders and commercial property. Yet after the *De La Cuesta* ruling, *Dawn* only applies to state chartered savings and loans and privately financed mortgages.

62. In anticipation of the *De La Cuesta* decision, from January to June of 1982, sixty-five state savings and loans obtained a federal charter. Telephone interview with Statistics Office, Federal Home Loan Bank Board (Sept. 14, 1982). One factor in this trend is that it is much easier to sell stock in a federally chartered savings and loan because shareholders can be sure that the due-on-sale clauses in the association's loan instruments are automatically enforceable. This in turn increases the value of the shares.

63. Graham, *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta: The U.S. Sup. Ct. Decides a Major Due-On-Sale Clause Case but Unanswered Questions Remain*, 5 REAL PROP. LAW RPTR. 105 (Ca. CEB, No. 6, August 1982).

due-on-sale clause was waived.[64]

The *De La Cuesta* decision also applies to loans made by federal savings and loans before July 31, 1976.[65] Because of the retroactive effect of the decision, a federal savings and loan can collect on its loans or demand an interest adjustment regarding all sales made before *De La Cuesta* in which the buyer assumed or took subject to the loan.[66] There may be a defense, however, if the lender waived its rights to enforce the due-on-sale clause. If the savings and loan knew of the sale and made no agreement with the buyer, the outcome will turn on whether the buyer can show that the lender's conduct constituted a waiver of the right to exercise the due-on-sale clause.[67]

The impact of *De La Cuesta* on national banks is uncertain. In 1981, the Comptroller of the Currency adopted a regulation allowing national banking associations to enforce due-on-sale clauses in adjustable-rate mortgage loans regardless of any contrary state laws.[68] It is clear, however, that loans insured by the Federal Housing Administration or guaranteed by the Veterans Administration are assumable because they do not include due-on-sale clauses.[69]

The *De La Cuesta* decision may have prevented whole classes of people from either buying or selling a home. In choosing to aid the lending institutions in a tight money market, the Court gave short shrift to the property rights of the individual consumer. The Court did not take into account the possible unequal bargaining power of the lender and the homeowner or home buyer. Yet, in California, the Civil Code provides for variable interest rate loans that may enable some consumers to finance a mortgage, so long as the Federal Home Loan Bank Board does not preempt this state legislation.[70]

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64. *Id.* at 106.

65. 102 S. Ct. at 3031 n.24.

66. Graham, *supra* note 63, at 106.

67. *Id.*

68. *Id.* at 107 (citing 46 Fed. Reg. 18.932 (1981)). "The U.S. District Court for the District of Columbia has ruled that 12 U.S.C. § 371(g), which authorizes the Comptroller to regulate the [creation] of loans secured by . . . real estate, . . . [empowered] the Comptroller to issue the regulation. Conference of State Bank Supervisors v. Lord (D.D.C. 1982) 532 F. Supp. 694." *Id.* The Conference of State Bank Supervisors is now challenging the regulation on appeal to the Court of Appeals for the District of Columbia.

69. *Id.* at 108.

70. CAL. CIV. CODE § 1916.5 (West Supp. 1982).

The *De La Cuesta* decision has drastically curtailed the availability of assumable mortgages. Since federally chartered savings and loans may exercise due-on-sale clauses contrary to state doctrine, it is now beyond the jurisdiction of state courts to evaluate the economic fairness of the enforcement of a due-on-sale clause by a federally chartered savings and loan.

Jennifer L. Smits

FOURTH AMENDMENT—AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT—PROBABLE CAUSE ALLOWS WARRANTLESS SEARCH OF CONTAINERS FOUND WITHIN LEGITIMATELY STOPPED AUTOMOBILE—*United States v. Ross*, 102 S. Ct. 2157 (1982).

On November 27, 1978, the District of Columbia Police Department received an informant's tip that narcotics were being sold at a certain location by a dealer who kept the drugs in the trunk of his car.[1] Acting upon this information, police officers located the suspect vehicle at the described location. A short while later they stopped the car and arrested the driver, Albert Ross, who matched the informant's description.[2] A subsequent warrantless search of the trunk revealed a zippered leather pouch containing $3200 in cash and a brown paper bag containing a white powder, later determined to be heroin.[3]

Ross' pretrial motion to suppress both the heroin and the money was denied, and he was convicted by the trial court of possession of heroin with intent to distribute.[4] The court of appeals reversed the conviction[5] holding that the police should not have opened either the paper bag or the leather pouch without first obtaining a warrant. It decided that in terms of constitutional significance, there was no difference between the two containers.[6] The court of appeals, relying on

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1. The informant, who "had previously proved to be reliable," had observed this individual, known as "Bandit," complete a sale and had been told that additional narcotics were in the trunk. 102 S. Ct. 2157, 2160 (1982).

2. The police officers found the maroon Malibu described by the informant and conducted a license check on the vehicle before they pulled Ross over. *Id.*

3. While they searched Ross, one of the officers found a bullet on the front seat of the car. This led to a further search of the car's interior which revealed a gun in the glove compartment. Ross was then arrested. After the arrest Ross' keys were used to open the trunk where the police found the narcotics and money. *Id.*

4. Ross was convicted under 21 U.S.C. § 841(a) (1970). *Id.*

5. United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981).

6. Initially a three-judge panel of the court of appeals reversed on the basis of Arkansas v. Sanders, 442 U.S. 753 (1979). This panel concluded that, although the automobile search was lawful under Carroll v. United States, 267 U.S. 132 (1924), "the constitutionality of a warrantless search of a container found in an automobile depends on whether the owner possesses a reasonable expectation of privacy in its

Arkansas v. Sanders,[7] rejected the contention that, because the officers were entitled to conduct a warrantless search of the entire vehicle, the opening of the containers was justified.[8]

The United States Supreme Court reversed the court of appeals and remanded the case.[9] It held that police officers who have legitimately stopped an automobile and have probable cause to believe that contraband is concealed somewhere within the automobile may conduct a warrantless search of the vehicle and all containers found within. The scope of this search may be as thorough as a magistrate could authorize by warrant.[10]

The Court granted certiorari in order to reconsider its decision in *Robbins v. California*.[11] The Court felt there was a great need to clarify the scope of the search authorized by the automobile exception to the warrant requirement, announced in *Carroll v. United States*.[12] *Carroll* established the rule that, because of practical considerations, automobiles could be exempt from the warrant requirement.[13] The *Ross* Court held

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contents." 102 S. Ct. at 2160. Applying this test to the case at hand, the panel concluded that the leather pouch was protected from a warrantless search while the paper bag was not. *Id.* at 2160-61.

The entire court of appeals then decided to rehear the case en banc. A majority saw "no specific, well-delineated exception" in any previous cases which would permit the warrantless search of "unworthy" containers. The majority decided that there was no justification for distinguishing between the two containers and that the police officers should not have opened either container without a warrant. *Id.* at 2160-61.

7. 442 U.S. 753 (1979) (automobile exception to the warrant requirement of Carroll v. United States, 267 U.S. 132 (1924), does not allow warrantless search of luggage found in automobile).

8. 655 F.2d at 1169. A minority consisting of three dissenting judges read *Sanders* differently. They felt that a warrant was required only for "luggage-type" containers. Other courts have held this as well. *See, e.g.*, United States v. Brown, 635 F.2d 1207 (6th Cir. 1980); United States v. Jimenez, 626 F.2d 39 (7th Cir. 1980).

9. The evidence contained within both the paper bag and the leather pouch was to be admitted into evidence at trial. 102 S. Ct. at 2173.

10. *Id.* at 2159. In other words, if probable cause authorizes the search of a lawfully stopped automobile, it also justifies the search of every part of the automobile and the contents within, which may conceal the object of that search. *Id.* at 2172.

11. 453 U.S. 420 (1981). *Robbins* was a plurality decision with five separate opinions. It left in a state of confusion the issue of the warrantless search of a container found in an automobile being searched pursuant to the automobile exception. 102 S. Ct. at 1273, (Blackman, J., concurring; Powell, J., concurring).

The Court felt that the need for clarification in this area of the law was necessitated by the "countless vehicles [which] are stopped on highways and public streets every day." Police officers are presented with a difficult situation every time they suspect contraband may be located within the stopped vehicle. *Id.* at 2161-62.

12. 267 U.S. 132 (1924).

13. *Id.* at 153.

that it was only logical, in view of the *Carroll* case and its progeny, that the scope of a warrantless search should not be defined by the nature of the container. Rather, the scope of the search would be limited by "the object of the search and the places in which there is probable cause to believe that it may be found."[14]

The Court's reasoning began with an examination of the fact patterns in *Carroll* and another automobile search case, *Chambers v. Maroney*.[15] Both cases involved extensive searches through the automobile to the point where, in *Carroll*, the upholstery was torn open.[16] In both cases the Court permitted the search and allowed the evidence found to be used against the defendants. In light of these cases, the Court reasoned that it would be illogical to assume that the decision in either case would have been different if the contraband searched for had been inside of a container.[17] The Court stated that such a rule "could produce absurd results inconsistent with the decision in *Carroll* . . . ."[18]

As the Court pointed out, the *Carroll* decision was applied in the past to allow warrantless searches of containers found during the lawful search of an automobile. The Court mentioned two post-*Carroll* decisions in which evidence found in this manner was ruled admissible, although in those cases it was not contended that the search required a warrant.[19] The

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14. 102 S. Ct. at 2172. The Court explained this reasoning further through practical examples:

> Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Id.

15. 399 U.S. 42 (1970).

16. 267 U.S. at 174.

17. If it was reasonable for prohibition agents to rip open the upholstery in *Carroll*, it certainly would have been reasonable for them to look into a burlap sack stashed inside; if it was reasonable to open the concealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it.

102 S. Ct. at 2169.

18. *Id.*

19. Scher v. United States, 305 U.S. 251 (1938) (law officers found packages of unstamped liquor in the trunk of an automobile and proceeded to open them without a warrant); Husty v. United States, 282 U.S. 694 (1931) (warrantless seizure of whiskey, some of which had been found in "whiskey bags").

Court also stated that prior to *United States v. Chadwick*[20] and *Arkansas v. Sanders*,[21] the lower courts had "routinely" held that containers found during lawful warrantless searches of automobiles could be searched as well without obtaining a warrant.[22]

The crucial section of the discussion concerns the Court's reading of the actual holding in *Carroll*. Although *Carroll* changed the law by allowing a warrantless search of an automobile, it did not specify any limitations regarding the scope of the search.[23] "It neither broadened nor limited the scope of a lawful search based on probable cause."[24] Therefore, the Court in *Ross* held that the scope of this warrantless search was meant to be as broad as the scope of any search authorized by a warrant and could extend as far as probable cause would justify.[25]

This decision as to the scope of a warrantless search applies to all containers equally. The Court agreed with the portion of its recent decision, *Robbins v. California*,[26] which held that there is no constitutional distinction between "worthy" and "unworthy" containers.[27] The Court stated that the amount of protection afforded a container does not depend

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20. 433 U.S. 1 (1977) (warrantless search of luggage or personal property not immediately associated with the person, after its reduction to exclusive police control and absent exigent circumstances, held not a valid search incident to arrest).

21. 442 U.S. 753 (1979).

22. 102 S. Ct. at 2169-70.

23. *Id.* As noted in Henry v. United States, 361 U.S. 98, 104 (1959), the decision in *Carroll* "merely relaxed the requirements for a warrant on the grounds of practicality."

24. 102 S. Ct. at 2170.

25. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

Id. at 2170-71.

26. 453 U.S. 420 (1981). The rest of the *Robbins* decision was overruled in *Ross*. *See infra* notes 50-53 and accompanying text.

27. [T]he central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or a knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

102 S. Ct. at 2171 (footnotes omitted).

upon whether it is a "luggage-type" container or otherwise. The only applicable standard is that of probable cause.[28]

The Court concluded its reasoning by discussing the balance it was striving to maintain between the individual's expectation of privacy and society's need for efficient law enforcement. Although this is a fine line, the Court reasoned that its decision in this case was justified. Just as necessity forced the individual to give way to a warrant issued on a magistrate's determination of probable cause, exigency necessitated that the scope of the automobile exception be broadened.[29] Furthermore, the Court was "convinced" that this new rule will be "faithful to the interpretation of the Fourth Amendment" followed by the Court "with substantial consistency" throughout its history.[30]

The decision that established the automobile exception to the warrant requirement of the fourth amendment is *Carroll v. United States*.[31] This case held that the search and seizure of an automobile based upon a police officer's determination of probable cause does not require a warrant. One aspect of *Carroll* notably absent from *Ross* was *Carroll*'s emphasis that if it is "reasonably practicable" to obtain a warrant under the circumstances, a warrant must be obtained.[32]

The *Carroll* decision was based upon an historical analysis and an examination of legislative intent. Congress had

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28. *Id.*

29. *Id.* at 2171-72.

30. *Id.* at 2172.

31. 267 U.S. 132 (1924). George Carroll and John Kiro were suspected by federal prohibition agents of being "bootleggers." This suspicion was based upon a meeting between Carroll and Kiro and the agents in which a sale of three cases of whiskey was discussed. The sale was never consummated, however, apparently due to the fact that Carroll had discovered the agents' true identity. Carroll and Kiro were known by the agents to travel the road between Grand Rapids and Detroit, an active center for the introduction of illegal liquor into this country.

On December 15, 1921, the agents happened upon Carroll and Kiro driving their Oldsmobile Roadster from the direction of Detroit. The agents pulled them over and began searching the car. No contraband was in plain sight; however, one officer noticed a portion of the upholstery that seemed noticeably harder than that of most rumble seats. The seat cushion was ripped open revealing 68 bottles of whiskey and gin inside. *Id.* at 134-36.

32. The Court in *Carroll* made a point of noting that a properly issued warrant protects the seizing officer from a suit for damages whereas in a warrantless search "the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." *Id.* at 156. The *Ross* Court was careful to reiterate this point. 102 S. Ct. at 2172 n.32.

passed several statutes which allowed reasonable warrantless searches of vessels, wagons, and carriages. The Court in *Carroll* stated that the practical necessity of such searches had never been questioned as long as they were distinguished from searches of stationary structures.[33]

In *Ross*, the Court based most of its decision on the language used in *Carroll*, because that case established the automobile exception. The Court looked at the historical analysis in *Carroll* and reasoned that the practical necessities forseen by Congress over the years would be "largely nullified" if the scope of an automobile search did not include containers located within the car.[34]

Fifty-three years after *Carroll*, the Supreme Court declined to extend the rationale behind the automobile exception established in *Carroll* to all movable objects. In *United States v. Chadwick*[35] the Court rejected the argument that

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33. [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153.

The distinction between stationary structures and movable containers was later rejected in United States v. Chadwick, 433 U.S. 1, 11 (1977).

34. The Court found it "noteworthy" that this early legislation relied on in *Carroll* concerned enforcing duty laws on imported merchandise. Since imported goods are generally contained in containers of all kinds it could be said that this legislation foresaw the need to open these shipping containers when necessary. Thus, the Court concluded that:

> [D]uring virtually the entire history of our country—whether contraband was transported in a horse drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.

102 S. Ct. at 2170 n.26.

35. 433 U.S. 1 (1977). Amtrak railroad officials in San Diego became suspicious of a brown, 200 pound footlocker being loaded onto a train bound for Boston. The officials noted that the trunk was unusually heavy for its size and was leaking talcum powder, a substance often used to mask the odor of hashish or marijuana. This information was relayed to federal agents in Boston who met the train. A trained police dog signaled the presence of a controlled substance within the footlocker without alerting the owners. After the footlocker was loaded into the trunk of Chadwick's car the police moved in and arrested Chadwick and his two companions. The footlocker was then taken to a secured place where it was opened without a warrant. Large

the *Carroll* rationale should permit the warrantless search of any movable container believed to be carrying contraband[36] by holding that "[o]nce law enforcement officers have reduced luggage or other personal property . . . to their exclusive control," a warrant is required in order to search.[37] The Court in *Chadwick* stated that the primary reason behind allowing the automobile exception to the warrant requirement was the diminished expectation of privacy which "surrounds the automobile."[38] No such exception could be justified for personal luggage since a "person's expectations of privacy in personal luggage are substantially greater than in an automobile."[39] In addition, the practical problems that exist when forced to detain an automobile while obtaining a warrant do not apply to a piece of luggage.[40]

The Court, in this case, was faced with the *Chadwick* rule that closed packages and containers may not be searched without a warrant. The Court, however, distinguished the *Chadwick* case since that case did not include a search of an automobile.[41] The Court noted that the trial court in *Chadwick* had stated that "there was no nexus between the search and the automobile, merely a coincidence."[42] The arresting officers therefore had probable cause to search only the footlocker. The Court decided that because *Chadwick* was not an "automobile case," its rules do not apply to searches of pack-

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amounts of marijuana were found in the footlocker. *Id.* at 3-4.

36. The *Chadwick* Court also responded forcefully to the Government's underlying argument that the warrant clause protects "only [those] interests traditionally identified with the home." *Id.* at 6. In unanimously rejecting this contention, the Court looked to the historical record, legislative interpretation, and case law and concluded that "a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home." *Id.* at 11.

37. *Id.* at 15.

38. *Id.* at 12. An automobile's contents and occupants are in plain sight as it travels public roads, the operator must be licensed, the automobile must periodically undergo official inspection and its primary function is transportation.

39. *Id.* at 13. Personal luggage is intended as a repository of personal effects and its contents are generally not open to public view or to regular official inspection. *Id.*

40. *Id.*

41. The district court in *Chadwick* noted: "The only connection that the automobile had to this search was that, prior to its seizure, the footlocker was placed on the floor of an automobile's open trunk." 102 S. Ct. at 2165 n.13 (quoting United States v. Chadwick, 393 F. Supp. 763, 772 (D. Mass. 1975)).

42. 102 S. Ct. at 2165 n.13.

ages or containers found during a warrantless automobile search.[43]

The facts of *Arkansas v. Sanders*[44] were almost identical to those in *Chadwick*. In *Sanders* the state argued that the automobile exception of *Carroll* was applicable, thereby justifying the warrantless search of a suitcase, in the trunk of a taxi, which the police had probable cause to suspect contained marihuana. The Court in *Sanders* did not agree, however, and based a large portion of its holding on *Chadwick*. It restated its position that luggage commanded a higher expectation of privacy than an automobile and that luggage, as opposed to an automobile, is much easier to detain while a warrant is obtained.[45] The *Sanders* Court saw no reason why this same logic should not apply to luggage contained within an automobile.[46]

The strict rule developed in *Sanders*, invalidating warrantless searches of containers found in automobiles, forced the *Ross* Court to distinguish much of the *Sanders* decision. The police in *Sanders* had probable cause only to seize the suitcase which happened to be in the trunk of the taxi, not to search the entire taxicab.[47] As stated by the Chief Justice in

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43. *Id.* at 2166.

44. 442 U.S. 753 (1979). A Little Rock police officer obtained information from a reliable informant that Sanders would arrive at Little Rock airport carrying a green suitcase containing marihuana. The airport was placed under surveillance and Sanders was spotted arriving on the flight specified by the informant. After depositing some hand luggage in a waiting cab, Sanders was observed retrieving a green suitcase matching the informant's description from the baggage claim area. He then gave the suitcase to a companion who had met Sanders at the airport. After putting the suitcase in the trunk of the taxi, they both climbed into the cab and drove away. Several blocks from the airport police officers, who had been following the cab, pulled them over. These officers then opened the trunk of the taxicab, found the suitcase and searched it immediately without a warrant. Inside they discovered 9.3 pounds of marihuana packaged in 10 plastic bags. *Id.* at 755.

45. *Id.* at 762-65.

46. "Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." *Id.* at 764-65 n.13. This general rule was limited by two situations in which a warrant will not be required. These are when: 1) The contents of a container "can be inferred from [its] outward appearance," and 2) the contents of a container are "open to plain view." *Id.*

47. "Because the police officers had probable cause to believe that respondent's green suitcase contained marihuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under *United States v. Chadwick*." *Id.* at 766.

his concurring opinion in *Sanders*, the relationship between the automobile and the contraband was "purely coincidental" just as it had been in *Chadwick*.[48] Thus, the Court in *Ross* reasoned that *Sanders* had extended *Chadwick* too broadly by suggesting that containers found within an automobile deserved the same constitutional protection as those seized anywhere else.[49]

The latest decision in this line of cases was *Robbins v. California*.[50] In this case the Supreme Court was finally faced with the issue of whether police officers conducting a warrantless automobile search could open a container found in the vehicle. Justice Stewart wrote for a plurality which agreed that the warrantless opening of the packages violated the fourth amendment. The *Robbins* plurality based its opinion on *Chadwick* and *Sanders*. Those cases clearly established that "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else."[51] The plurality further emphasized that the nature of a container made no difference as to the constitutional protection afforded it.[52] This conclusion was based on the reasoning that there should be no greater privacy interests in a suitcase than in a paper bag.[53]

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48. *Id.* at 767 (Burger, C.J., concurring).

49. 102 S. Ct. at 2167.

50. 453 U.S. 420 (1981). California Highway Patrol officers stopped Robbins' station wagon because he had been driving erratically. One of the officers smelled marijuana smoke when Robbins opened the car door. Robbins was then searched and a vial of liquid was discovered. A search of the interior of the vehicle revealed some marihuana and the equipment for using it. After placing Robbins in the patrol car, the police officers opened the tailgate of the station wagon and raised the cover of a recessed luggage compartment. In the compartment were two packages wrapped in green opaque plastic which the officers unwrapped, and discovered a large amount of marijuana in each. *Id.* at 422.

51. *Id.* at 425.

52. The Government had raised the argument that packages wrapped in green opaque plastic were not entitled to the same protection extended to containers commonly used to transport "personal effects." In support of this position, the Government had cited "numerous opinions" that drew a distinction between luggage-type containers and containers that were less sturdy in nature, such as cardboard boxes. *Id.* at 425-26.

53. Using language from *Chadwick*, the Court pointed out that a container is protected as long as the owner "manifested an expectation that the contents would remain free from public examination." Therefore, all containers must be protected since "no court, no constable, no citizen can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffle bag or box."

The *Ross* Court did not attempt to distinguish *Robbins* because the issue was fundamentally the same in both cases. Although agreeing that there should be no constitutional distinction between different types of containers,[54] the Court indicated that the wrong controlling question had been addressed in *Robbins*.[55] The *Robbins* Court did not examine the scope of the automobile exception to the warrant requirement because the parties in *Robbins* had not pressed this argument.[56] This question was squarely addressed by the parties in *Ross* and therefore presented "a better opportunity for thorough consideration of the basic principles in this troubled area."[57]

The dissent, written by Justice Marshall, stated emphatically that the holding in this case violates the spirit of the fourth amendment, ignores clear precedent and, on balance, is simply an unnecessary encroachment of individual rights.[58]

Justice Marshall maintained that since the Court could not rely on any of the justifications underlying the automobile exception, it was essentially forced to create a new exception to the amendment.[59] He stated that this exception empowers an officer to act as a magistrate and will lead to the loss of important protections afforded by the warrant requirement.[60]

The dissent's second contention was that the majority ne-

Only those containers whose contents are in plain view can be examined by an officer in the course of a warrantless search. *Id.* at 426-27.

54. 102 S. Ct. at 2171.

55. The Court pointed to Justice Powell's concurring opinion in *Robbins* where he indicated his discomfort with the *Robbins* decision. Powell further suggested that some case may be presented in the future which would offer a basic opportunity for "thorough consideration" of these basic principles. 102 S. Ct. at 2168.

56. *Id.*

57. *Id.*

58. *Id.* at 2173-74.

Justice Brennan joined Justice Marshall's opinion. Justice White wrote a very brief dissent but stated: "I also agree with much of Justice Marshall's dissent in this case." *Id.*

59. The dissent refers to this newly created exception as the "probable cause" exception to the warrant requirement. Other attempts to create such an exception had been "soundly rejected" in the past. *Id.* at 2176.

60. The protections of the warrant requirement enumerated by the dissent are that it: a) "Limits the concentration of power held by executive officers over the individual, and prevents some overbroad or unjustified searches from occurring at all" *Id.* at 2174; b) "prevent[s] hindsight from coloring the evaluation of the reasonableness of a search or seizure" *Id.* at 2175 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976)); and, c) "reassures the public that the orderly process of law has been respected." *Id.* at 2174-75.

glected to follow the letter and spirit of previous auto search cases. Not only does this disrupt the consistency needed by the Court, but it also leads to unsound theory. The dissent pointed out that *Chadwick, Sanders,* and *Robbins* all held that the search of a movable container is not supported by the traditional rationales for the automobile exception.[61] Therefore, *Ross* is a clear departure from precedent and creates an anomaly when it allows the immediate search of this same container only if it is found during a warrantless automobile search.[62] The dissent next questioned the Court for its reliance on *Carroll,* since *Carroll* was only concerned with the practicalities of immobilizing a vehicle. There was no discussion concerning containers found within the car; therefore, according to the dissent, any reliance the Court placed on *Carroll* was unfounded.[63]

Finally, the dissent raised the question of values. The dissent did not believe that the assistance this new rule will provide the police justifies taking away vital fourth amendment protection from all citizens,[64] contending that the police were not unnecessarily burdened under the *Robbins* standard;[65] the dissent stated that any further gains in efficiency can never justify disregard of the fourth amendment.[66]

Exactly how this decision will affect any future reading of the fourth amendment is unclear. It is clear that this Court

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61. *Id.* at 2177.

62. "In light of these considerations, I conclude that any movable container found within an automobile deserves precisely the same degree of Fourth Amendment warrant protection that it would deserve if found at a location outside the automobile." *Id.*

63. *Id.* at 2178. The *Carroll* Court had no occasion to address the practical difficulties of impounding a container. The dissent maintained that the practical difficulties in seizing a package do not approach those faced when seizing an automobile. *Id.* at 2179.

64. "The only convincing explanation I discern for the majority's broad rule is expediency: it assists police in conducting automobile searches, ensuring that the private containers into which criminal suspects often place goods will no longer be a Fourth Amendment shield." *Id.* at 2181.

65. "No 'nice distinctions' are necessary, however, to comprehend the well-recognized differences between movable containers (which, even after today's decision, would be subject to the warrant requirement if located outside an automobile), and the automobile itself, together with its integral parts." *Id.*

66. "I had thought it well established that 'the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.' " *Id.* "Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most 'efficient' form of government?" *Id.* at 2181 n.13.

has created another exception to the warrant requirement and, in the process, chipped away further at the vital protection the fourth amendment affords the individual.[67]

It has been a firmly established principle of the law that exceptions to the warrant requirement could only be created for reasons of exigency.[68] Warrantless searches are supposed to be "per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."[69] The exception created in this case, however, does not appear to be based on necessity. It would be little more than an inconvenience for a police officer to be required to bring containers found during an automobile search before a magistrate in order to obtain a warrant.

In fact, it appears that the practical problems which necessitated the *Carroll* decision no longer exist. During the

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67. "[E]ach exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment . . . ." 442 U.S. at 759-760.

68. *See* Arkansas v. Sanders, 442 U.S. 753, 758-761; United States v. Chadwick, 433 U.S. 1, 11.

69. Mincey v. Arizona, 437 U.S. 385, 390 (1978) (citing Katz v. United States, 389 U.S. 347, 357 (1967)). Very few exceptions to the warrant requirement of the fourth amendment exist due to the importance of the fundamental values this amendment was designed to protect. The language of the fourth amendment is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

This amendment reflects the American colonists' resentment of the writs of assistance to which they were subjected by the English. It requires a carefully drawn, limited warrant for searches of private premises based upon probable cause. "By requiring that conclusions concerning probable cause and the scope of a search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' Johnson v. United States, 333 U.S. 10, 14 (1948), we minimize the risk of unreasonable assertions of executive authority." Arkansas v. Sanders, 442 U.S. 753, 759.

Exceptions have been recognized by the courts where "the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate." *Id.* at 760. These exceptions have been limited only to those situations where they are deemed absolutely necessary "to accommodate the identified needs of society." *Id.* Thus, warrantless searches are allowed in exigent circumstances or moments of emergency, when the search is incident to arrest, and in the case of an automobile that has been legitimately stopped, if the police officer has probable cause to believe that it contains contraband or evidence of a crime.

Prohibition Era the police did not have the equipment necessary to impound an automobile. Today, in most instances, police can seize an automobile and with relative ease, bring it to the station. Furthermore, our present transportation network would seem to mitigate the inconvenience to a defendant whose vehicle has been impounded. Finally, telephonic warrants, a recent development, allow officers to obtain verbal warrants over the radio.

It is apparent that no constitutional justification exists for allowing police to open containers found during an automobile search. There is certainly no diminished expectation of privacy in a container. In fact, containers exhibit a heightened degree of privacy interests by their very nature. Furthermore, as stated above, they are easily impounded and can be taken from the scene in a police car. The only justification remaining for this rule is that it facilitates the "prompt and efficient completion of the task at hand."[70] As the dissent noted, heightened efficiency can never justify disregard of the fourth amendment.[71]

In general, the Court has experienced difficulties interpreting the scope of the automobile exception to the fourth amendment and how this amendment applies to containers.[72] Past decisions attempted to maintain the heightened protections afforded to containers and strictly limit the automobile exception.[73] The Burger Court is apparently reacting to the problem of crime by giving the police greater power over the individual citizen.[74] In simplifying the rule so the police can search any container found during an automobile search if he has probable cause to believe that contraband is located therein, this Court has certainly resolved any confusion caused by the fourth amendment. Whether this amendment

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70. 102 S. Ct. at 2171.

71. *Id.* at 2181.

72. In the last six years the Court has been faced with deciding the *Chadwick, Sanders, Robbins,* and *Ross* cases, all of which dealt with warrantless searches of containers.

73. *See* Robbins v. California, 453 U.S. 420; Arkansas v. Sanders, 442 U.S. 753; United States v. Chadwick, 43 U.S. 1.

74. Recent Supreme Court criminal procedure decisions, such as *Ross* and New York v. Belton, 453 U.S. 454 (1982), show the Court's increasing willingness to move the fourth amendment balance away from the rights of the accused and toward more "efficient" police procedures.

can survive any further "clarifications" by this Court remains to be seen.

Raymond L. Slaidins

LIBEL AND SLANDER—ILLEGAL DISSEMINATION OF CONFIDENTIAL MATERIAL NOT PROPERLY ALLEGED—ABSOLUTE PRIVILEGE FOR GOVERNMENT OFFICIALS SUSTAINS DEMURRER WITHOUT LEAVE TO AMEND—*Kilgore v. Younger*, 30 Cal. 3d 770, 640 P.2d 793, 180 Cal. Rptr. 657 (1982).

Gerald Hay Kilgore was one of ninety-two persons identified in Attorney General Evelle J. Younger's Organized Crime Control Commission (OCCC) report, as being linked with organized criminal activity.[1] The OCCC's written report discussed the problems of organized crime in California and proposed potential solutions.[2] Kilgore's name appeared on a list of individuals which was appended to the report.[3] At a press conference on May 2, 1978, Younger distributed copies of the OCCC report to members of the news media and announced that he was adopting the report as his own.[4]

Articles in the Los Angeles Herald Examiner and the Los Angeles Times identified Kilgore by name as being included in the OCCC's report;[5] neither paper, however, connected him

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1. Kilgore alleged that in July, 1977, Attorney General Younger established an 8-member commission in the California Justice Deparment to study the current level of organized crime in the state and to determine the effectiveness of existing controls. Kilgore v. Younger, 30 Cal. 3d 770, 774, 640 P.2d 793, 180 Cal. Rptr. 657, 659 (1982).

2. *Id.* at 774, 640 P.2d at 795, 180 Cal. Rptr. at 659. *See generally* CAL. GOV'T CODE §§ 15025 (provides, *inter alia*, for the research and analysis of organized crime in California by the Justice Department) and 15028 (provides for the Justice Department to report on activities and accomplishments regarding the control of organized crime to the legislature, law enforcement agencies, and other interested groups)(Deering 1982).

3. The report contained Kilgore's name, residence address, and picture. It stated:

> Kilgore owns and operates a wire service in the Los Angeles area that provides information on sporting events to bookmakers in California and throughout the United States. His company has 15 telephones that provide free information concerning sporting events on a twenty-four hour basis. During 1976, his company had a $590,000 telephone bill. Kilgore had associated with many bookmakers throughout the country and has been convicted of bookmaking in 1962 and 1975. On May 10, 1977, he was sentenced to fourteen months in federal prison for conspiracy to commit wire fraud.

30 Cal. 3d at 774-75, 640 P.2d at 795-96, 180 Cal. Rptr. at 659-60.

4. *Id.* at 775, 640 P.2d at 796, 180 Cal. Rptr. at 660.

5. *Id.* The May 2 edition of the Herald Examiner featured an account of the

with any specific criminal activity.[6] Kilgore unsuccessfully sought a correction or retraction of the articles from the newspapers' publishers.[7]

Kilgore subsequently filed suit against Younger and the media for defamation,[8] intentional infliction of emotional distress, and invasion of privacy.[9] Both Younger and the media demurred to the complaint on the grounds that the published information was privileged.[10] The trial court sustained the demurrers without leave to amend.[11]

The court of appeal held that section 47 of the Civil Code,[12] which provides protection for the fair and true report of a public meeting, was an adequate basis upon which to uphold the media demurrers.[13] The court reversed the trial court's ruling sustaining Younger's demurrer without leave to amend.[14] The court questioned the propriety of Younger's release of the information to the news media.[15] On that basis,

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news conference and substance of the OCCC report. Kilgore was listed in a companion article as being linked to organized crime in the state, as found by the OCCC. The May 3 edition of the Times listed Kilgore's name and hometown under the headline, "List of 92 Reputed Mob Figures." Both papers detailed numerous activities organized crime was allegedly involved in. Kilgore v. Younger, 162 Cal. Rptr. 469, 472 (1980), *vacated*, 30 Cal. 3d 770, 640 P.2d 793, 180 Cal. Rptr. 657 (1982).

6. 30 Cal. 3d at 775, 640 P.2d at 796, 180 Cal. Rptr. at 660.

7. *Id.*

8. *Id.* News media defendants included the Hearst Corp., which publishes the Herald Examiner, reporter Mike Quall and publisher Frances Dale; the Times Mirror Corp., which publishes the Times, reporter Bill Farr, and publisher Otis Chandler. *Id.*

9. *Id.*

10. *Id.* CAL. CIV. CODE § 47 (Deering Supp. 1982) provides:

> A privileged publication . . . is one made—
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> . . . .
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> 4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.
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> 5. By a fair and true report [in a public journal] of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

11. 30 Cal. 3d at 775, 640 P.2d at 796, 180 Cal. Rptr. at 660.

12. CAL. CIV. CODE § 47(5) (Deering Supp. 1982). *See supra* note 10.

13. Kilgore v. Younger, 162 Cal. Rptr. 469, 474 (1980), *vacated*, 30 Cal. 3d 770, 640 P.2d 793, 180 Cal. Rptr. 657 (1982).

14. *Id.* at 479.

15. *Id.* The court, however, stated: "Nothing in this opinion is intended to hold under what circumstances a violation of the strictures of [Penal Code] sections 11077 and 11141 would deprive Younger of his absolute privilege." *Id. See infra* notes 37-

the court determined that the plaintiff could state a cause of action premised on the theory that Younger's illegal dissemination of the confidential information was not a proper discharge of an official duty.[16]

On appeal to the California Supreme Court, the judgment regarding the media demurrers was unanimously affirmed.[17] The court, however, reversed the appellate court's ruling granting Kilgore leave to amend.[18] The court held, with three Justices dissenting, that Younger's release of the OCCC report to the news media was within the scope of his official duties, and that Kilgore failed to state a cause of action which would defeat Younger's absolute privilege.[19]

The court first addressed whether the media's demurrer could be sustained under section 47 of the Civil Code, which provides protection for the "fair and true" report of a public meeting.[20] The court viewed the press conference as a legally convened public meeting and the press as merely in attendance as the public's representative.[21]

The court was troubled by plaintiff's contention that subdivision 5 of Civil Code section 47 required that the articles be "fair and true" to be privileged.[22] Plaintiff maintained that the articles' description of organized criminal activity suggested that he was involved in all aspects of organized crime.[23] In assessing the media's response that the articles did not go beyond the import of the OCCC report,[24] the court applied

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16. 162 Cal. Rptr. at 479.

17. 30 Cal. 3d at 778, 640 P.2d at 797, 180 Cal. Rptr. at 661.

18. *Id.* at 783, 640 P.2d at 800, 180 Cal. Rptr. at 664.

19. *Id.* at 779, 783, 640 P.2d at 798, 800, 180 Cal. Rptr. at 622, 664.

20. *Id.* at 776, 640 P.2d at 796, 180 Cal. Rptr. at 660. *See supra* note 10. *See also* RESTATEMENT (SECOND) OF TORTS, § 611 comment i (1976) (defamatory material in a report of a public meeting is privileged if proceeding is reported fairly and accurately).

21. 30 Cal. 3d at 776, 640 P.2d at 796, 180 Cal. Rptr. at 660.

22. *Id.* at 776, 640 P.2d at 796, 180 Cal. Rptr. at 660.

23. *Id.* at 777, 640 P.2d at 797, 180 Cal. Rptr. at 661.

24. The media asserted that one need only capture the "gist" or "sting" of the subject proceeding for the privilege to attach. *Id. See* Hayward v. Watsonville Register-Pajaronian and Sun, 265 Cal. App. 2d 255, 262, 71 Cal. Rptr. 295, 300 (1968) (defendant need not justify every word of alleged defamatory matter if substantial imputation be proved accurate). *Cf.* Handelsman v. San Francisco Chronicle, 11 Cal. App. 3d 381, 388, 90 Cal. Rptr. 188, 192 (1970) (alleged libelous articles to be judged in their entirety).

California's test for allegedly defamatory language[25]—namely how a community in which the defamatory statements were published would interpret the material.[26] In the court's view, an "average reader" of either paper would interpret the articles to imply that the plaintiff was involved only in some "fashion" with organized crime.[27] The court concluded that this was exactly the import of the OCCC report, and therefore, as a matter of law, the reports were fair and true.[28]

The court rejected plaintiff's emotional distress claims on the rationale that to hold otherwise would defeat the purpose of the privilege pronounced in section 47 and would likewise operate as a severe deterrent to otherwise protected communications.[29]

Furthermore, the court held that plaintiff's privacy claims failed because once Younger released the report to the news media, that information became a matter of public record.[30] The court refused to prohibit the publication of such "newsworthy" information.[31]

The court next examined whether Younger's demurrer could also be sustained under Civil Code section 47,[32] which provides protection for a publication made in the proper dis-

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25. 30 Cal. 3d at 777, 640 P.2d at 797, 180 Cal. Rptr. at 661.

26. *Id.* The court looked to *Handelsman* for authority. That case concerned a crime report in a newspaper in which the term "theft" was substituted for "conversion." In determining whether the report was fair and true, the *Handelsman* court stated that the report should be judged on how those in the community where the material was published would interpret the alleged defamatory language. 11 Cal. App. 3d at 387, 90 Cal. Rptr. at 191.

27. 30 Cal. 3d at 777, 640 P.2d at 797, 180 Cal. Rptr. at 661.

28. *Id.*

29. *Id.* The court relied on Lerette v. Dean Witter Org. Inc., 60 Cal. App. 3d 573, 579, 131 Cal. Rptr. 592, 594-95 (1976). In *Lerette*, the court held that a cause of action for the intentional infliction of emotional distress concerning a pre-litigation communication was subject to an absolute privilege under § 47(2) of the Civil Code. The *Younger* court determined that the rationale in *Lerette* was equally applicable to § 47(5). 30 Cal. 3d at 777, 640 P.2d at 797, 180 Cal. Rptr. at 661.

30. 30 Cal. 3d at 778, 640 P.2d at 797, 180 Cal. Rptr. at 661.

31. *Id. See also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Kapellas v. Kofman, 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969); RESTATEMENT (SECOND) OF TORTS, § 652D comment.b (1977). These authorities recognize the competing interest of the public in newsworthy matters with that of the individual's interest in privacy.

32. CAL. CIV. CODE, § 47(a) (Deering Supp. 1982) provides that a privileged publication is one made "[i]n the proper discharge of an official duty." *See generally supra* note 2.

charge of an official duty.[33] Plaintiff contended that Younger was not entitled to the protection of an absolute privilege because the report illegally released information protected by Penal Code sections 11075[34] (Criminal Record Information) and 11105[35] (State Summary Criminal History Information).[36] Thus, plaintiff argued that Younger's act was not a proper discharge of his official duties.[37]

Similarly, plaintiff argued that Younger was criminally li-

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33. 30 Cal. 3d at 778, 640 P.2d at 797, 180 Cal. Rptr. at 661.

34. CAL. PENAL CODE § 11075 (Deering 1980 & Supp. 1982) states in full:

> (a) As used in this article, "criminal offender record information" means records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release.
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> (b) Such information shall be restricted to that which is recorded as the result of an arrest, detention, or other initiation of criminal proceedings or any consequent proceedings related thereto.

35. CAL. PENAL CODE § 11105 (Deering 1980 & Supp. 1982) states in pertinent part:

> (a)(1) The Department of Justice shall maintain state summary criminal history information,
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> (2) As used in this section:
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> (i) "State summary criminal history information" means the master record of information compiled by the Attorney General pertaining to the identification and criminal history of any person, such as name, date of birth, physical description, data of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data about such person.
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> (ii) "State summary criminal history information" does not refer to records and data compiled by criminal justice agencies other than the Attorney General, nor does it refer to records of complaints to or investigation conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice.

(Also listed are thirteen officials, departments, and agencies authorized to receive state summary criminal history information. Ten others are authorized to receive such information upon a showing of compelling need).

36. 30 Cal. 3d at 779, 640 P.2d at 798, 180 Cal. Rptr. at 662.

37. Plaintiff contended "that Younger's duty to report under the Government Code was eclipsed by his duty to remain silent under the Penal Code." *Id.* *See* CAL. PENAL CODE § 11077 (Deering 1980) which provides in pertinent part:

> The Attorney General is responsible for the security of criminal offender record information. To this end he shall:
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> (a) Establish regulations to assure the security of criminal offender record information from unauthorized disclosures at all levels of operation in this state.
>
> (b) Establish regulations to assure that such information shall be disseminated only in situations in which it is demonstrably required for the performance of an agency's or official's functions.

able under Penal Code sections 11142 and 11144, which provide penalties for the dissemination of criminal record information to someone not authorized to receive it.[38] The court rejected these arguments on purely procedural grounds; because plaintiff did not directly allege such illegal dissemination, the complaint failed to state a cause of action.[39]

Plaintiff further argued that the dissemination of the OCCC report to the news media was politically motivated.[40] The court rejected this argument on the rationale that Younger had called the press conference in his capacity as Attorney General, and that the conference concerned exclusively law enforcement issues.[41]

Plaintiff also contended that the trial court had abused its discretion in denying him leave to amend.[42] The court recited that leave to amend is properly denied when there are no factual disputes and, although the nature of the plaintiff's claim is clear, no liability exists under substantive law.[43] To substantiate its conclusion, the court embarked on a discussion of the policy of according government officials absolute privileges.

The court began by discussing the nature of the privilege

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38. CAL. PENAL CODE § 11142 (Deering 1980) provides in full: "Any person authorized by law to receive a record or information obtained from a record who knowingly furnishes the record or information to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor." CAL. PENAL CODE § 11144 (Deering 1980) provided in pertinent part: "(a) It is not a violation of this article to disseminate statistical or research information obtained from a record, provided that the identity of the subject of the record is not disclosed."

39. On the basis of statutory language alone, the court treats the OCCC information released concerning the plaintiff as that which would be included under section 11105, subdivision (a)(2)(ii) of the Penal Code, and thus excepted from the definition of state summary criminal history information. 30 Cal. 3d at 781, 640 P.2d at 799, 180 Cal. Rptr. at 663. *See supra* note 35.

40. *Id.* at 779, 640 P.2d at 798, 180 Cal. Rptr. at 662.

41. *Id.*

42. *Id.* at 781, 640 P.2d at 799, 180 Cal. Rptr. at 663.

43. *Id.* (quoting 3 B. WITKIN, CALIFORNIA PROCEDURE § 847 (2d ed. 1971)). The court also cited Berkeley Police Ass'n v. City of Berkeley, 76 Cal. App. 3d 931, 143 Cal. Rptr. 255 (1977) and Robertson v. City of Long Beach, 19 Cal. App. 2d 676, 66 P.2d 167 (1937). In both of these cases neither plaintiff could show to the court that their pleadings were capable of amendment to state a cause of action. The *Younger* court admitted that plaintiff's only "tenable contention" was that Younger improperly discharged an official duty by illegally disseminating information protected under the Penal Code. The court, however, read Younger's privilege as withstanding that challenge. 30 Cal. 3d at 781, 640 P.2d at 779, 180 Cal. Rptr. at 663.

as stated in *Saroyan v. Burkett*:[44] high ranking government officials are free to publish false and defamatory matter if the matter has some relation to the official's government duties.[45] *Saroyan* observed that the extent to which executive officials have an absolute privilege is difficult to determine on statutory language alone.[46] The court noted that no prior California case had construed what limit the term "proper" had on the discharge of an official duty; yet, the *Saroyan* court avoided defining possible limits and instead followed the rule that an official acting outside the scope of his authority was not protected.[47]

The *Younger* court found no California case which denied a high-ranking government official immunity from civil liability for publications made in the disposition of his governmental duties, regardless of whether or not he was acting within the purview of other statutory provisions.[48] Thus, the court reasoned, Younger's privilege protected him against any of the plaintiff's claims.[49]

To further justify its position, the court looked to *Barr v. Matteo*,[50] which stressed that public officials must be granted

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44. 57 Cal. 2d 706, 371 P.2d 293, 21 Cal. Rptr. 557 (1962). In *Saroyan*, the plaintiff was employed by the Superintendent of Banks as an attorney in connection with the liquidation of Japanese banks in California. The Superintendent issued a press release which insinuated that the plaintiff's conduct during his tenure as attorney was incompetent. Since the release related to the defense of departmental policy, the court held that it was privileged. *See infra* note 45 and accompanying text.

45. 57 Cal. 2d at 710, 371 P.2d at 296, 21 Cal. Rptr. at 566 (quoting RESTATEMENT OF TORTS § 591 (1938)).

> Thus the head of a federal or state department may be authorized to issue press releases giving the public information concerning the conduct of the department, or events of public interest that have occurred in connection with it; and if he is so authorized he is within the scope of his official duties when he gives the information to the press."

Id. See also Sanborn v. Chronicle Publishing Co., 18 Cal. 3d 406, 412, 556 P.2d 764, 767, 134 Cal. Rptr. 402, 405 (1976) (recognized that high-ranking government officials are accorded absolute privileges); RESTATEMENT (SECOND) OF TORTS § 591 comments d and f (1977). Comment d provides that the privilege is absolute. Comment f provides that the privilege extends to publications an officer is authorized to make in his official capacity.

46. 57 Cal. 2d at 710, 371 P.2d at 295, 21 Cal. Rptr. at 559. The court determined that "the solution must be found by considering the treatment of the subject in the law generally." *Id.*

47. *Id.* at 709, 371 P.2d at 295, 21 Cal. Rptr. at 559.

48. 30 Cal. 3d at 781, 640 P.2d at 799, 180 Cal. Rptr. at 663.

49. *Id.* at 783, 640 P.2d at 800, 180 Cal. Rptr. at 664.

50. 360 U.S. 564 (1959). *Barr* concerned the acting director of the Office of Rent Stabilization who, following a widely publicized challenge, issued a press release

the freedom to perform their official duties without the fear of damage suits.[51] The *Barr* Court feared that civil liability would "cripple" the effective administration of a particular governmental branch or agency.[52] It noted that civil tort law is not the only available sanction to deter governmental officials from irresponsible behavior in exercising their official duties.[53]

The *Younger* court emphasized that the fear of potential civil liability would have a substantial "chilling effect" on the proper and uninhibited disclosure of information essential to the functioning of government if a cause of action similar to the instant case could proceed.[54] The result would be that the "[m]ere allegation that the publication contained confidential information would avoid a demurrer."[55] Fact findings as to the source of the improperly disclosed information would make litigation confusing and unwieldy.[56] The court feared that even the most trivial claims would necessitate hearings to determine the scope of propriety the official exercised in each case.[57]

The court's position is analogous to the reasoning stated in *Hancock v. Burns*:[58] that the policy of absolute immunity may protect a particular social interest, which in effect, outweighs the plaintiff's claims.[59] The *Hancock* court speculated that allowing a cause of action against an official's discretionary act, even if exercised with mistaken authority, would re-

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whereby he stated reasons for suspending two other agency officers. The Court held that the director was absolutely privileged because the press release related to his official duties and informed the public of departmental policy. *Id.* at 575.

51. 30 Cal. 3d at 781, 640 P.2d at 800, 180 Cal. Rptr. at 664. The *Barr* Court stated, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." 360 U.S. at 572 (quoting Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (1949)).

52. The *Barr* Court also feared that potential liability would deter the open criticism and free debate of government which provides for an informed public opinion. 360 U.S. at 570.

53. *Id.* at 576. The Court alluded to the impeachment process.

54. 30 Cal. 3d at 782, 640 P.2d at 800, 180 Cal. Rptr. at 664.

55. *Id.*

56. *Id.*

57. *Id.*

58. 158 Cal. App. 2d 785, 323 P.2d 456 (1958). *Hancock* concerned plaintiffs who were dismissed from employment for refusing to appear before a Senate Fact Finding Committee on Un-American Activities. In dismissing the complaint without leave to amend, the court held that legislative immunity protected the committee's actions, even if exercised with mistaken authority. *Id.* at 794, 323 P.2d at 462.

59. *Id.* at 794, 323 P.2d at 462.

quire an examination of the official's motives as well as propriety.[60] The *Hancock* court found that such reexamination would impinge upon the fundamental separation of powers doctrine, the continuance of which had greater social importance.[61]

Chief Justice Bird, who concurred in part and dissented in part,[62] criticized the majority's focus as being misplaced.[63] She contended that the correct issue was not whether Younger was protected by an absolute privilege but whether Younger's release of the allegedly confidential material constituted a proper discharge of an official duty.[64]

The dissent noted authorities which suggest that an official may not always be accorded an absolute privilege.[65] Reasoning that these authorities indicate that the "bare assertion" of an absolute privilege may not always be enough, the dissent asserted that certain prerequisites must be met.[66]

Among such prerequisites, according to the dissent, was plaintiff's contention that a "proper" discharge of an official duty must also be a lawful one.[67] Without that distinction, the term "proper" could encompass an unlawful act.[68]

Like the majority, the dissent acknowledged the importance of providing for the efficient functioning of government and that an absolute privilege effectively accomplishes that objective.[69] Chief Justice Bird, however, recognized that the

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60. In effect, the judiciary "would be required to reexamine every act of the executive and legislative branches which had an adverse effect upon any individual." *Id.* at 792, 323 P.2d at 460.

61. *Id.* at 794, 323 P.2d at 462.

62. The Chief Justice was joined by Justices Tobriner and Tamura. 30 Cal. 3d at 783, 640 P.2d at 799, 180 Cal. Rptr. at 664.

63. *Id.* at 789, 640 P.2d at 804, 180 Cal. Rptr. at 668-69.

64. *Id.* at 790, 640 P.2d at 805, 180 Cal. Rptr. at 669.

65. *Id.* at 789, 640 P.2d at 804, 180 Cal. Rptr. at 669. The dissent also noted that *Sanborn*, which the majority cited, distinguished between an official's policy-making (decisional) functions which are privileged and ministerial (operational) functions which are not. 18 Cal. 3d at 415, 556 P.2d at 764, 134 Cal. Rptr. at 402. *See e.g.*, Spalding v. Vilas, 161 U.S. 483, 498 (1896); H & M Assocs. v. City of El Centro, 109 Cal. App. 3d 399, 408, 167 Cal. Rptr. 392 (1980); Cheatum v. Wehle, 5 N.Y.2d 585, 159 N.E.2d 166, 186 N.Y.S.2d 606 (1959).

66. 30 Cal. 3d at 789, 640 P.2d at 805, 180 Cal. Rptr. at 669.

67. *Id.* at 789-90, 640 P.2d at 805, 180 Cal. Rptr. at 669.

68. The dissent reasoned that the Attorney General's interpretation of section 47, subdivision 1 of the Civil Code, reads the term "proper" out of the statute altogether. *Id.* at 790, 640 P.2d at 805, 180 Cal. Rptr. at 669.

69. *Id.*

public's best interest is not always served by providing immunity to government officials who violate the law.[70]

The dissent pointed to *Butz v. Economou*,[71] in which the United States unsuccessfully argued that an absolute privilege must be accorded to all government officials.[72] *Butz* concluded that in actions against government officials arising out of constitutional violations, it was appropriate to weigh a plaintiff's right to compensation with the need to protect particular government functions.[73] The *Butz* Court reasoned that insisting on an awareness of constitutional limitations would not seriously interfere with the exercise of official duties.[74]

The Chief Justice further looked to *White v. Davis*,[75] which noted that a California constitutional amendment providing for the right of privacy, was directed at, *inter alia*, "the improper use of information properly obtained for a specific purpose."[76] Under *White*, the dissent concluded that the plaintiff's constitutional right of privacy was violated by the release of information allegedly protected by the non-disclos-

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70. The court stated:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All of the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

Id. (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).

71. 438 U.S. 478, 485 (1978). In *Butz*, a plaintiff filed suit against Department of Agriculture officials, who had unsuccessfully attempted to revoke his commodities company's registration, alleging that they had unconstitutionally instituted proceedings against him. The Court held that federal executive officials charged with constitutional violations are granted only a qualified immunity unless absolute immunity is essential for the proper functioning of a particular office. *Id.* at 507.

72. *Id.* at 485. The *Butz* Court rejected this argument as "unsound." The Court also rejected the government's reliance on *Barr:*

> [*Barr*] did not address the liability of the acting director had his conduct not been within the outer limits of his duties, but from the care with which the Court inquired into the scope of his authority, it may be inferred that had the release been unauthorized, and surely if the issuance of press releases had been expressly forbidden by statute, the claim of absolute immunity would not have been upheld.

Id. at 489.

73. *Id.* at 503.

74. *Id.* at 506.

75. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975). In *White*, police officers posed as students in university classes and covertly recorded class discussions for the purpose of filing intelligence reports on professors and students. The court denied the police immunity and held that the covert practice violated the constitutional right of freedom of speech and the state constitutional right of privacy. *Id.* at 760, 533 P.2d at 224, 120 Cal. Rptr. at 96.

76. *Id.* at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

ure statutes.[77] Following that conclusion, Chief Justice Bird reasoned that the plaintiff's complaint was defective only as to substance and, therefore, leave to amend was improperly denied.[78]

In conclusion, the *Younger* court decided the case on the policy of according government officials absolute privileges to ensure their full and energetic performance in government free from the threat of civil liability. The court deferred to the legislature to provide sanctions for the improper disclosure of confidential information by a government official, but failed to define what types of information would be so confidential as to deny a government official the protection of an absolute privilege.[79]

In the final analysis, *Younger* did not deviate from the traditional interpretation of a proper discharge of duty; if the matter complained of has some relation to the proceeding in which the official is acting, it is privileged. The court was unwilling to test the extent, if any, the term "proper" has on the measure of propriety exercised by a government official in the discharge of his official duties.

The gravamen of the court's thinking was the fear of opening a proverbial Pandora's box of litigation. The court's advice that future legislation would be wise to focus on the "nature" of the information disclosed rather than the "source"[80] illustrates that fear; such advice does not promise to expand the treatment of defamation law in general.

Perhaps if the courts were willing to focus on the nature of a plaintiff's claim instead of reading immunity on the face of a complaint, claims with potential constitutional dimensions, such as Kilgore's, would not go unredressed. Until then, the only plausible claims are those for damages arising out of constitutional violations and these must be distinctly and accurately pleaded at the initial stage of litigation.

Although the public has an interest in the proper func-

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77. 30 Cal. 3d at 793-94 n.10, 640 P.2d at 807 n.10, 180 Cal. Rptr. at 671 n.10. "It is conceivable that plaintiff can allege a knowing violation of his constitutional right of privacy (CAL. CONST. art. I, § 1) by virtue of the Attorney General's release of his criminal record to the public." *Id.* at 794, 640 P.2d at 807, 180 Cal. Rptr. at 671.

78. *Id.* at 793-94, 640 P.2d at 807, 180 Cal. Rptr. at 671. *See* 3 B. WITKIN, CALIFORNIA PROCEDURE § 847 (2d ed. 1971) (amendment should be allowed when defect may "possibly" be cured by supplying omitted allegations).

79. 30 Cal. 3d at 782, 640 P.2d at 800, 180 Cal. Rptr. at 664.

80. *Id.*

tioning of government, that interest is no more compelling than the interest of ensuring that elected officials act within proscribed areas of the law. Obviously, the *Younger* court avoided tackling the seemingly impenetrable immunity of the government official.

Priscilla A. Brown

STATE PREEMPTION OF CITIES' POWER TO REGULATE TRAFFIC—*Rumford v. City of Berkeley*, 31 Cal. 3d 545, 645 P.2d 124, 183 Cal. Rptr. 73 (1982).

In 1975, the Berkeley City Council adopted a traffic management plan which was designed to shift traffic from local to arterial streets with the aid of traffic barriers. Within six months forty-one diverters were installed. In 1976 Berkeley permanently adopted the plan.[1] Berkeley was then sued by several individual plaintiffs and an unincorporated association, Citizens for Legal Action Against the Barricades. Requesting a writ of mandate, the plaintiffs claimed that the barriers failed to meet the Department of Transportation's uniformity standards. Other individuals and another unincorporated association, Berkeleyans for Fair Traffic Management, subsequently intervened on behalf of Berkeley.[2]

The trial court held that the barriers were "traffic control devices" within the meaning of Vehicle Code section 440,[3] but that they did not conform to the Department of Transportation's (DOT) uniformity standards and specifications as required under Vehicle Code sections 21401[4] and 21400.[5] The court granted plaintiffs' writ of mandate requiring Berkeley to remove the barriers already installed, and prohibiting Berkeley from installing any more barriers. Berkeley and interveners appealed the judgment.

The California Supreme Court affirmed the trial court's

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1. Rumford v. City of Berkeley, 31 Cal. 3d 545, 549, 645 P.2d 124, 125, 183 Cal. Rptr. 73, 74 (1982).

2. *Id.* at 548, 645 P.2d at 125, 183 Cal. Rptr. at 74.

3. CAL. VEH. CODE § 440 (Deering 1972 & Supp. 1983) "An 'official traffic control device' is any sign, signal, marking, or device, consistent with Section 21400, placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulation, warning, or guiding traffic."

4. CAL. VEH. CODE § 21401 (Deering 1972 & Supp. 1983) "Except as provided in Section 21374, only those official traffic control devices that conform to the uniform standards and specifications promulgated by the Department of Transportation shall be placed upon a street or highway."

5. CAL. VEH. CODE § 21400 (Deering 1972 & Supp. 1983) "The Department of transportation shall, after consultation with local agencies and public hearings, adopt rules and regulations prescribing uniform standards and specifications for all official traffic control devices placed pursuant to the provisions of this code . . . ." Rumford v. City of Berkeley, 31 Cal. 3d at 549, 645 P.2d at 125, 183 Cal. Rptr. at 74.

grant of the writ of mandate in *Rumford v. City of Berkeley*.[6] In holding that Berkeley did not have the power to install the barriers, the court reaffirmed the well-established rule that traffic control is a matter entirely preempted by the state. The court, however, also recognized that the state may delegate to the cities power to control traffic.

Berkeley argued that such a delegation of power had been made under Vehicle Code section 21101(a) which permits the "[c]losing [of] any highway to vehicular traffic when, in the opinion of the legislative body having jurisdiction, the highway is no longer needed for vehicular traffic."[7] The barriers allowed some traffic through and thus effected only a "partial closure" of the streets. Section 21101(a), the court reasoned, does not cover "partial closures" because such closures are not expressly mentioned in the section.[8] Moreover, the predecessor of section 21101(a) was enacted to cover a "complete closure" case which was pending at the time. Following the rule that "delegations of power to cities regarding vehicular traffic will be strictly construed,"[9] the court concluded that "partial

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6. 31 Cal. 3d 545, 645 P.2d 124, 183 Cal. Rptr. 73 (1982).

7. CAL. VEH. CODE § 21101(a) (Deering 1972 & Supp. 1983). Other subdivisions of § 21101 provide:

> (b) Designating any highway as a through highway and requiring that all vehicles observe official traffic control devices before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to the intersection.
> (c) Prohibiting the use of particular highways by certain vehicles, except as otherwise provided by the Public Utilities Commission pursuant to Article 2 (commencing with Section 1031) of Chapter 5 of Part 1 of Division 1 of the Public Utilities Code. No ordinance which is adopted pursuant to this subdivision after the effective date of the amendments to the section enacted at the 1969 Regular Session shall apply to any state highway which is included in the national system of interstate and defense highways, except an ordinance which has been approved by the California Highway Commission by a four-fifths vote.
> (d) Closing particular streets during regular school hours for the purpose of conducting automobile driver training programs in the secondary schools and colleges of this state.
> (e) Temporarily closing a portion of any street for celebrations, parades, local special events, and other purposes when in the opinion of local authorities having jurisdiction such closing is necessary for the safety and protection of persons who are to use that portion of the street during temporary closing.

8. 31 Cal. 3d at 551-52, 645 P.2d at 126-27, 183 Cal. Rptr. at 75-76.

9. *Id.* at 553, 645 P.2d at 128, 183 Cal. Rptr. at 77 (citing People v. Moore, 229 Cal. App. 2d 221, 228, 40 Cal. Rptr. 121, 125 (1964) and Holman v. Viko, 161 Cal. App. 2d 87, 93, 326 P.2d 551, 556 (1958)).

closing of the Berkeley streets is not authorized by section 21101 subdivision (a)."[10]

The majority's definition of a partial closure appears clear as applied to the facts of *Rumford*. When applied to a more complex factual setting, however, the definition is hazy and unpredictable. For example, in *City of Lafayette v. Contra Costa County*,[11] a gate installed across a street had completely closed off the traffic with the exception of the area residents who were supplied with a device to open the gate.[12] The court of appeal held that section 21101(a) provided no authority for the partial closure.[13]

The dissent in *Rumford* insisted that *City of Lafayette* was inapplicable because as used therein, partial closure goes to the distinction between residents and nonresidents.[14] The majority, however, pointed out that the same principle was present in both cases: the street had been closed to some traffic.[15] This interpretation leaves some unanswered questions. By "some traffic" is the court implying differentiation between various sizes and types of vehicles? Can "partial closures" be effected by restricting use during certain periods of the day? What effect, if any, does the selective discrimination in *City of Lafayette* have on the presence of "partial closure?"

The court rejected Berkeley's second argument that the legislature had delegated authority to regulate traffic by virtue of Vehicle Code section 21100(d),[16] which delegates to cities

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10. 31 Cal. 3d at 554, 645 P.2d at 128, 183 Cal. Rptr. at 78 (footnote omitted). The court disapproved a contrary holding in Snyder v. City of Pasadena, 53 Cal. App. 3d 1051, 126 Cal. Rptr. 320 (1975). *Id.* at 554 n.8, 645 P.2d at 128 n.8, 183 Cal. Rptr. at 78 n.8.

11. 91 Cal. App. 3d 749, 154 Cal. Rptr. 374 (1979).

12. *Id.* at 752, 154 Cal. Rptr. at 376.

13. *Id.* at 756-57, 154 Cal. Rptr. at 378-79.

14. 31 Cal. 3d at 564, 645 P.2d at 134-35, 183 Cal. Rptr. at 83-84 (Bird, C.J., dissenting).

15. *Id.* at 554, 645 P.2d at 128, 183 Cal. Rptr. at 77.

16. *Id.* at 555, 645 P.2d at 129, 183 Cal. Rptr. at 78. In 1975, § 21100 provided:

> Local authorities may adopt rules and regulations by ordinance or resolution regarding the following matters:
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> (a) Regulating or prohibiting processions or assemblages on highways.
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> (b) Licensing and regulating the operation of vehicles for hire and drivers of passenger vehicles for hire.
>
> (c) Regulating traffic by means of traffic officers.
>
> (d) Regulating traffic by means of semaphores or other official traffic control devices.

the power to regulate traffic by means of "official traffic control devices." Official traffic control devices are defined in section 440 as "any sign, signal, marking, or device, consistent with section 21400 placed or erected . . . for the purpose of regulating, warning, or guiding traffic."[17] While cities are empowered to install such devices by section 21351,[18] they are required to comply with uniformity standards which section 21400 requires the DOT to adopt and promulgate in California Administrative Code title 21 sections 1409.1-9.

The court first examined whether the barriers were official traffic control devices under Vehicle Code section 440. Defendants contended that section 440 applied only to devices which communicate by "symbol," e.g., traffic signs and stop lights. Astonished by this self-defeating argument, the court explained that section 440 covers any sign or device "that is placed for the purpose of traffic control."[19]

Berkeley argued that if diverters were official traffic control devices, then other devices such as median strips, sidewalk curbs, or pedestrian islands would also be subject to the uniformity requirements. The court dismissed this assertion by distinguishing between the narrowly construed power to regulate traffic under Vehicle Code section 21100(d) and "cities' broad powers to *construct and maintain streets*,"[20] such as building sidewalks and median strips and other "structural

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(e) Regulating traffic by means of any person given temporary appointment for such duty by the local authority whenever official traffic control devices are disabled or otherwise inoperable.

(f) Regulating traffic at the site of road or street construction or maintenance by persons authorized for such duty by the local authority.

(g) Licensing and regulating the operation of tow car service.

(h) Operation of bicycles, and, as specified in Section 2114.5, electric carts by physically disabled persons, or persons 50 years of age or older, on public sidewalks. . . .

CAL. VEH. CODE § 21100 (Deering 1972 & Supp. 1983).

17. CAL. VEH. CODE § 440 (Deering 1972 & Supp. 1983).

18. CAL. VEH. CODE § 21351 (Deering 1972) provides:

Local authorities in their respective jurisdictions shall place and maintain or cause to be placed and maintained such traffic signs, signals and other traffic control devices upon streets and highways as required hereunder, and may place and maintain or cause to be placed and maintained, such appropriate signs, signals or other traffic control devices as may be authorized hereunder or as may be necessary properly to indicate and to carry out the provisions of this code or local traffic ordinances or to warn or guide traffic.

19. 31 Cal. 3d at 556, 645 P.2d at 129-30, 183 Cal. Rptr. at 78-79.

20. *Id.* at 556-57, 645 P.2d at 129-30, 183 Cal. Rptr. at 79-80 (emphasis added).

changes." Since the barriers were built for the purpose of regulating traffic and were not a permanent part of the street itself, their installation was found not to lie within Berkeley's power to maintain and construct streets.[21] Thus the barriers could only have been installed pursuant to authority granted under section 21100(d), in compliance with the uniformity standards prescribed by the DOT.

In considering whether diverters complied with the uniformity standards, the court analyzed California Administrative Code sections 1409.1-1409.9. While these regulations do not cover barriers, section 1409.9 provides that "[a]ll [other] official traffic control devices . . . which are not specifically covered by these regulations . . . shall conform to the statutory requirements, if any, in effect at the time of their installation."[22] The interveners argued that regulation 1409.9 validates all devices not prohibited by law at the time of installation.

The interveners' reading of regulation 1409.9 did not convince the court, which held that DOT must prescribe uniform standards and "only the devices that meet those standards . . . may be erected . . . ."[23] Moreover, to the extent DOT purports to authorize unregulated traffic control devices, "it violates sections 21400 and 21401."[24]

The majority rejected the argument that "chaos" would arise if the diverters were found to be unlawfully installed because other "[c]ommonly used devices are likewise not the subject of regulations" and thus would be equally invalid and subject to suit for removal. The court noted that "the legality of devices other than barriers is not before us" and noted further that these other devices may have been installed pursuant to standards found in the DOT's Traffic Manual.[25]

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21. *Id.* at 556-58, 645 P.2d at 129-31, 183 Cal. Rptr. at 79-80.

22. CAL. ADMIN. CODE tit. 21, R. 1409.9 (1972).

23. 31 Cal. 3d at 557, 645 P.2d at 130, 183 Cal. Rptr. at 80.

24. *Id.* at 558, 645 P.2d at 130-31, 183 Cal. Rptr. at 79.

25. *Id.* It is interesting to note that interveners' prediction became a reality. The DOT held a hearing on August 26, 1982 to discuss emergency standards for adoption in order to comply with § 21401. Also, Assemblyman Bates of Berkeley proposed Assembly Bill 2873 which amended § 440 to exclude diverters as well as other devices from the class of official traffic control devices. A.B. 2873 also added subsection (f) to § 211 enabling cities to prohibit entry or exit to streets with devices in accordance with their general plan. A.B. 2873 contains a sunset clause which would terminate the amendments on December 31, 1983. The bill is merely an emergency measure to stave off the rash of suits which could arise against the cities, and to give

Thus, the Supreme Court of California held that the installation of the barriers was not justifiable under the cities' power to close streets or regulate traffic under Vehicle Code sections 21101(a) and 21100(d) respectively.[26] The *Rumford* court's strict interpretation of the uniformity requirement restricts the cities' ability to utilize the traffic control devices which best solve their unique traffic problems. Strict interpretation of delegated powers results in the impairment of a city's ability to implement a plan it has found to be the safest and most effective means of coping with the increasing traffic control problems which it faces.

The *Rumford* decision also settles the basic question of whether the field of traffic control is preempted by the State or whether the cities may rely upon their police powers. The majority in *Rumford* held that the entire field of traffic control is preempted by Vehicle Code section 21 which provides: "Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the state and in all counties and municipalities therein, and *no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized therein.*"[27] Therefore, a city is powerless over its traffic unless it is an expressly designated specific power.[28]

The dissent did not think that the preemption was so complete because the Government Code appears to give cities considerable traffic control authority. Cities are required by the state to adopt "a comprehensive, long-term general plan" prepared by its planning agency.[29] A "circulation element" must be included in the general plan,[30] which includes, among other things, "matters as may be related to the improvement of circulation of traffic."[31] The Chief Justice's dissent points out that "each city has broad power to adopt a circulation element in its general plan that is designed to solve the particu-

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both the cities and the legislature time to come up with a permanent solution. 1982 Cal. Legis. Serv. 749 (West).

26. 31 Cal. 3d at 558, 645 P.2d at 131, 183 Cal. Rptr. at 80.

27. *Id.* at 550, 645 P.2d at 126, 183 Cal. Rptr. at 75 (emphasis added by court).

28. *Id.*, 645 P.2d at 126, 183 Cal. Rptr. at 75 (citing Pipoly v. Benson, 20 Cal. 2d 366, 371, 125 P.2d 482, 485 (1942); Biber Elec. Co. v. City of San Carlos, 181 Cal. App. 2d 342, 344, 5 Cal. Rptr. 261, 262 (1960)).

29. CAL. GOV'T CODE § 65300 (Deering 1979).

30. CAL. GOV'T CODE § 65302(b) (Deering 1979 & Supp. 1983).

31. CAL. GOV'T CODE § 65303(b) (Deering 1979).

lar traffic problems of that locality"[32] and that Berkeley has here "sought to protect its residential neighborhoods from the safety and environmental hazards caused by excessive vehicular traffic."[33]

The *Rumford* decision marks a significant erosion of the police powers of cities. Before *Rumford,* cities' police power to protect the health, safety, and welfare of their citizens was a source of their control over traffic.[34] For some time this source of authority has been waning and the state's preemption in the area is becoming more firmly established.[35] *Rumford* deals the death blow to cities' police power in this area with its narrow construction of the authority delegated to them in the Vehicle Code and its complete rejection of police power as a source of authority.

Rumford represents a departure from the traditional deference given to cities in passing legislation designed to protect the health, safety, and welfare of its citizens.[36] The immediate effect of the decision was to potentially invalidate the installation of similar devices by cities throughout California. Fortunately, this crisis may be stayed by the emergency actions of the DOT and A.B. 2873.[37] What long-term solution the legislature and the cities will develop has not yet been decided, but what is known is that the California Supreme Court set an important precedent in reducing the cities' ability to effectively provide a safe and healthy environment in which to live.

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32. Rumford v. City of Berkeley, 31 Cal. 3d 545, 561, 645 P.2d 124, 133, 183 Cal. Rptr. 73, 82 (1982) (Bird, C.J., dissenting).

33. *Id.*, 645 P.2d at 133, 183 Cal. Rptr. at 82.

34. *See, e.g.*, Simpson v. City of Los Angeles, 4 Cal. 2d 60, 47 P. 475 (1935); Snyder v. City of Pasadena, 53 Cal. App. 3d 1051, 196 Cal. Rptr. 390 (1975).

35. *See* Irwin v. City of Manhattan Beach, 65 Cal 2d 13, 415 P.2d 764, 51 Cal. Rptr. 881 (1966).

36. *See* Rumford v. City of Berkeley, 31 Cal. 3d 545, 564, 645 P.2d 124, 134, 183 Cal. Rptr. 73, 82 (1982) (Bird, C.J., dissenting).

37. 1982 Cal. Legis. Serv. 749 (West).